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Supreme Court, U.S.
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No. 93-1454 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

Petitioners,

v.

KENNETH CLAIR,

Respondent.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

-------- * --------

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April 14, 1994

22 pgs

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution of a state prisoner pending appointment of counsel to assist the prisoner in preparing and filing a habeas corpus petition?

LIST OF PARTIES

The parties to the proceedings below were Kenneth Clair, an inmate under sentence of death at California State Prison, San Quentin, California, and Daniel Vasquez, then-warden of California State Prison at San Quentin.

The respondent before this Court is Kenneth Clair.

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No. 93-1454

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October Term, 1993

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BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-------- * --------

Respondent, Kenneth Clair, hereby responds to the Petition for Writ of Certiorari (the "Petition") filed by petitioners Arthur Calderon, Warden, California State Prison at San Quentin, and Daniel E. Lungren, Attorney General of the State of California ("the State"), seeking review of the order of the United States Court of Appeals for the Ninth Circuit filed on December 30, 1993 finding that the State's appeals from orders staying Mr. Clair's execution were moot.

ADDITIONAL STATUTES AND RULES INVOLVED

Title 21 United States Code, Section 848 (q)(4)(B), provides:

> "In any post conviction proceeding under Section 2254 or Section 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

Title 28 United States Code, Section 1651(a), the "All Writs Act," provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28 United States Code, Section 2071, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be

consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."

Federal Rules of Civil Procedure, Rule 83, provides:

"Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

Civil Rule 26.8.7(c) of the United States District Court for the Central District of California (hereinafter "Local Rules") provides:

"(c) Temporary Stay for Preparation of the Petition: Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for

one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause."

STATEMENT OF THE CASE

Respondent, Kenneth Clair, an indigent, is currently under sentence of death and confined at San Quentin State Prison in California. His conviction and sentence of death were affirmed by the California Supreme Court on automatic appeal, People v. Clair, 2 Cal.4th 627, 7 Cal.Rptr.2d 564 (1992), as was his petition for habeas corpus to the same court. Respondent's Petition for Writ of Certiorari to the United States Supreme Court was also denied. Mr. Clair's unsuccessful direct appeal as well as his state petition for habeas corpus alleged in detail multiple federal constitutional violations, as did his petition to this Court.

On February 19, 1993, the Orange County Superior Court for the State of California set April 13, 1993, as the date for execution of the judgment of death. On February 22, 1993, in accordance with Local Rule 26.8.7(b), and with the assistance of the California Appellate Project, respondent filed in pro per a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence" with the United States District Court for the Central District of California and

requested a 45-day stay of execution to permit appointment of counsel.

A. The First Appeal

On March 1, 1993, United States District Judge Gary L. Taylor granted Mr. Clair's request for a stay of the execution, extending the date to and including May 28, 1993. Judge Taylor forwarded Mr. Clair's request for the appointment of counsel to the Attorney Selection Board for the Central District of California. See, Local Rule 26.8.4(a). On March 11, 1993, the State filed its notice of appeal. The State's Petition relates to that appeal. The State seeks permission to immediately execute Mr. Clair without any federal court considering the merits of Mr. Clair's federal claims.

Prior to the expiration of the execution stay, in May 1993, Michael Millman, director of the California Appellate Project and a member of the Attorney Selection Board, requested an additional 45-day stay of execution to allow the Selection Board the necessary time to find federal habeas counsel for Mr. Clair. Mr. Millman represented to the District Court that the request was made because qualified federal habeas counsel had not yet been located. Judge Taylor granted the request. The State did not appeal, moving instead to vacate the May stay of execution.

B. Appointment of Federal Habeas Counsel

On July 22, 1993, Henry H. Rossbacher was appointed to represent Mr. Clair in his federal habeas corpus proceeding.

On July 23, 1993, Judge Taylor denied the California Attorney General's motion to vacate the May stay order in an extensive written opinion. See United States District Court for the Central District of California Order filed on July 23, 1993 (reported at 827 F.Supp. 1465) (see Appendix A, pp. 9a-14a).

On October 6, 1993, counsel for petitioner, in compliance with Local Rule 26.8.7(c), filed the Specification of Nonfrivolous Issues to be Raised in Petition for Writ of Habeas Corpus. The Specification itemized thirty-one (31) separate issues (with sub-parts).

Based on the filing of the Specification and pursuant to the same Local Rule, Mr. Clair's stay of execution was continued by Judge Taylor to and including February 11, 1993. The State did not appeal this order. The district court subsequently set the filing date for the petition at September 15, 1994 and extended the stay of execution through September 19, 1994. The State has also not appealed this order. This is the stay which is currently in effect.

C. The State's Second Appeal

The State of California then appealed from the July 23, 1993 order denying the State's motion to vacate the stay of execution. In essence, the State again asked permission to immediately

execute Mr. Clair, despite the appointment of counsel. That appeal was filed was filed August 17, 1993.

D. The Court of Appeals Decision

Petitioner filed a motion to dismiss both appeals as moot, citing the frivolousness of the State's position and pointing particularly to the appointment of counsel and the filing of the Specification of Nonfrivolous Issues on October 6, 1993. On December 30, 1993, the United States Court of Appeals dismissed the State's appeals as moot. This writ followed.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF ARGUMENT

The issues raised by the State are moot. The stays of execution at issue have expired, permanent federal habeas counsel has been appointed and a Statement of Nonfrivolous Issues alleging multiple federal constitutional violations is before the District Court. Moreover, subsequent stays have been granted which have not been appealed. Even if, arguendo, the issue is "capable of repetition," it is not "evading review." The State can raise the issue in cases where federal habeas counsel have not been appointed and no Specification of Nonfrivolous Issues is before the Court.

The Petition should also be denied because Judge Taylor and the Ninth Circuit have correctly decided the issue. The Courts' determinations are compelled by this Court's decision in

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), in which this Court held that a federal habeas petitioner must assert all possible constitutional issues in an initial petition or risk losing potentially viable claims. Partial, protective writs are not merely discouraged but actually penalized by that decision. Central District Local Rule 26.8.7 ensures that the petitioner has a meaningful opportunity to comply with the mandate of McCleskey.

The State here refers to Demosthenes v. Baal, 495 U.S. 731, 737, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990), for the principal that before granting a stay, federal courts must make certain that an adequate basis exists for the exercise of federal power, claiming that only a petition can discharge this obligation. Even if that is a correct reading of Demosthenes, which petitioner disputes, the requirement of an adequate basis has been met in a number of different ways. First, the record reflects that petitioner raised federal constitutional issues both in his direct state appeal and state habeas corpus petition as well as his petition to this Court. Second, of course, petitioner has filed with the District Court a seventeen-page Statement itemizing no less than thirty-one separate federal habeas issues (with sub-parts). The State does not challenge the adequacy of these showings, only their form. 28 U.S.C § 2251 provides an adequate basis for the district court's jurisdiction, and even if it did not, the All Writs Act (28 U.S.C. § 1651(a)) provides an adequate independent jurisdictional basis.

The Petition should also be denied as the issues raised are presently being decided by the Court in McFarland v. Collins, United States Supreme Court #93-6497, which was argued on March 29, 1994.

The Petition should be denied with respect to the second issue raised by the State, as the State did not challenge the Central District's Local Rules pertaining to habeas corpus cases, and, thus, failed to preserve this issue on appeal. It is further anomalous for the State Attorney General to be seeking Supreme Court review of a district court rule when the Attorney General was a member of the task force that helped to formulate that rule.

Finally, the third issue presented in the Petition concerning the execution stay requested by a member of the Central District's Attorney Selection Board was no more than a factual issue resolved by the district court, and in any event, not important enough to merit review by this Court.

II. THE NINTH CIRCUIT DECISION IS CORRECT AS THE ISSUES RAISED IN PETITIONERS' APPEAL ARE MOOT

The Petition should be denied because the Ninth Circuit fully considered and correctly decided that the issues raised on appeal by the State were moot. The stays of execution at issue have expired, permanent counsel has been appointed, a seventeen-page Statement of Nonfrivolous Issues alleging thirty-one (with sub-parts) separate federal constitutional violations is before

the district court, and subsequent stays, have been sought by counsel and granted. Even if the issue arguably is "capable or repetition," it is not "evading review." There exists, therefore, no justiciable case or controversy.

III. THE QUESTIONS RAISED BY PETITIONERS ARE PRESENTLY BEFORE THE COURT IN McFARLAND v. COLLINS

The Petition\should also be denied as the issues presented therein are effectively before the Court in Franklin Basil McFarland v. James A. Collins, United States Supreme Court #93-6497. On March 29, 1994, this Court heard oral argument in the McFarland case.

IV. PETITIONERS' ARGUMENT REGARDING THE DISTRICT COURT'S JURISDICTION TO GRANT PRE-PETITION STAYS OF EXECUTION IS WITHOUT MERIT

The Petition should also be denied because Petitioners' argument that the district court has no jurisdiction to stay an execution prior to the filing of the federal petition is without merit. Petitioners argue that only upon the filing of a petition for a writ of habeas corpus is a habeas corpus "proceeding" initiated, triggering jurisdiction of the district court to stay an execution. This position is not tenable in light of the entitlement to counsel in federal habeas proceedings. The filing of an application for appointment of counsel commences a federal habeas proceeding under 28 U.S.C. § 2254, giving the federal

courts authority to appoint counsel under 28 U.S.C. § 848 (q)(4)(B) and stay executions under 28 U.S.C. § 2251.

Further authority to appoint counsel and stay an execution is found under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act authorizes stays of execution where a stay is necessary to preserve future habeas jurisdiction. This Court regards the All Writs Act as a principal source of its own power to stay an execution to enable federal review. See, e.g., Lenhard v. Wolff, 443 U.S. 1306 (1979) (Rehnquist, J., in chambers); see generally Annot., Stay of Execution of Death Sentence by Supreme Court or Justice Thereof, 78 L.Ed.2d 914, 917-918 (1985). Presumably even the State would concede that its killing of Mr. Clair would oust the district court of jurisdiction.

Further, the Anti-Injunction Act, 28 U.S.C. § 2283, facilitates, rather than prohibits, the exercise of federal judicial power. The equitable underpinnings of § 2283 permitted the stay of the state court judgment for any of three reasons: (1) The stay was expressly authorized by 28 U.S.C. § 2251 when Mr. Clair filed his pro se application and thus commenced his federal habeas proceeding; (2) the stay was authorized by § 848(q), in order to effectuate its provisions, to have been "expressly authorized" by Congress; and (3) the stay was authorized under the All Writs Act, and stays properly entered pursuant to that act are permitted under § 2283.

V. THE CENTRAL DISTRICT'S LOCAL RULES ON THE ORDERLY ADMINISTRATION OF HABEAS CORPUS CASES CORRECTLY FOLLOW THE DICTATES OF FEDERAL LAW

The Petition should also be denied as the Central District's Local Rules, which Petitioners helped formulate, properly set forth a framework in which to apply federal statutes involving habeas corpus proceedings. The Local Rules are no more than an exercise of the District Court's authority to regulate proceedings before it provided for by the Federal Rules of Civil Procedure, Rule 83.

Petitioners do not deny the stays were properly issued under the Local Rules, but instead argue the Local Rules themselves are invalid. Under the scenario urged by Petitioners, an indigent inmate would be required to file a habeas corpus petition in order to obtain a stay for the appointment of counsel to assist in the filing of a habeas corpus petition. Such a paradoxical procedure would result in capital defendants being left without counsel to assist them in seeking relief from the federal courts, contrary to the intent of 21 U.S.C. § 848(q).

VI. PETITIONERS' CLAIM REGARDING THE CENTRAL DISTRICT RULES WAS NOT RAISED OR PRESERVED BELOW AND WAS WAIVED

The Petition should also be denied as the State failed to raise or preserve in either of its two appeals to the Ninth Circuit its claim that Local Rule 26.8.7 violates the Separation of Powers Doctrine.

VII. MICHAEL MILLMAN'S APPLICATION FOR A STAY OF EXECUTION PENDING APPOINTMENT OF COUNSEL INVOLVED A FACTUAL ISSUE WHICH WAS RESOLVED BY THE DISTRICT COURT, AND IS NOT IMPORTANT ENOUGH TO WARRANT REVIEW

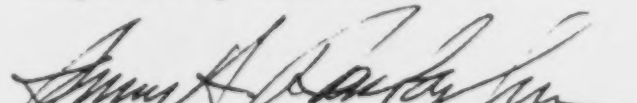
Finally, the Petition should properly be denied as there is no justiciable case or controversy with respect to the State's claim that a member of the Attorney Selection Board improperly sought a continuation of the stay of execution pending the identification of counsel. After analyzing the unique facts and circumstances surrounding Michael Millman, Esq.'s application for a stay, filed subsequent to the application made by Mr. Clair, the district court was satisfied that Mr. Millman was acting by and on behalf of Mr. Clair. In his order denying the motion to vacate the stay, Judge Taylor found that Mr. Millman's request on behalf of Mr. Clair (who clearly had no intention of abandoning his federal habeas action) was proper under the circumstances in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 14, 1994

Respectfully submitted,



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April 14, 1994

5045.002

Clerk of the Court
UNITED STATES SUPREME COURT
One 1st Street, N.W.
Washington, DC 20543

Re: CALDERON and LUNGREN v. KENNETH CLAIR
Case No. 93-1454

Dear Sir or Madam:

Enclosed for filing please find the original and ten (10) copies of the following documents:

1. RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and

2. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Please conform the attached face sheets and return them in the self-addressed, stamped envelope provided.

Thank you for your anticipated courtesy. Should you have any questions, please do no hesitate to call either Mr. Rossbacher or me collect.

Sincerely,

ROSSBACHER & ASSOCIATES

Linda L. Griffis

Linda L. Griffis

LLG:no

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STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Union Bank Plaza, 24th Floor, 445 South Figueroa Street, Los Angeles, California 90071.

On April 14, 1994, I served the foregoing document described as **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daniel E. Lungren, Esq.
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George H. Williamson, Esq.
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U.S. NINTH CIRCUIT
COURT OF APPEALS
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Hon. Gary L. Taylor
United States District Court
751 W. Santa Ana Boulevard
Santa Ana, CA 92701-4793

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on April 14, 1994, at Los Angeles, California.

Nancy R. Oberlin

NANCY R. OBERLIN

no\5045.002\oppcert

CERTIFICATE OF SERVICE BY MAIL

Attorney:

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No. 93-1454
October Term, 1993

Arthur Calderon, Warden, and
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Petitioners

v.

Kenneth Clair,
Respondent

I, the undersigned, hereby declare that I am a citizen of the United States, that I am 18 years of age or older, that I am employed in the County of San Diego, State of California, in which county the below stated mailing occurred, that I am not a party to the subject cause, and that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

I further declare that I have caused the within

REPLY BRIEF

to be served on:

William K. Sutter, Clerk, Supreme Court of the United States, Washington, DC 20543, an original and 40 copies;

and by placing one or more copies in a separate envelope addressed to each addressee named below which envelope was then sealed and, with postage prepaid, deposited in the United States mail by me at San Diego,California, on the 22d day of April, 1994:

Cathy Catterson, Clerk
U.S. Court of Appeals
for the Ninth Circuit
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U.S. District Court
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I further declare that there is delivery service by the United States Postal Service and/or private courier service at each place so addressed, or regular communication by the United States Postal Service and/or private courier service between the place of mailing and each place so addressed.

I hereby further declare, under penalty of perjury, that the foregoing is true and correct.

Dated at San Diego, California, this the 22d day of April, 1994.

CARL H. HORST,
Deputy Attorney General